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DATED: 6-23-08

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FILED

JUN 23 2008

CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION AT SANTA ANA
BY [Signature] DEPUTY

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
EASTERN DIVISION**

KATRINA MULHOLLAND

Petitioner,

v.

TINA HORNBECK, Warden,

Respondent.

Case No. EDCV 08-0823-ABC (MLG)

MEMORANDUM AND ORDER DISMISSING
MOTION TO TOLL TIME TO FILE
PETITION WITH LEAVE TO AMEND

Petitioner, a California state prisoner, filed this Motion to Toll Time for Writ of Habeas Corpus on June 18, 2008. It is unclear whether Petitioner is attempting to file a petition for writ of habeas corpus and a request for a stay of proceedings, or is seeking an extension of time to file a petition for writ of habeas corpus. If this is a petition for writ of habeas corpus, it suffers from the following deficiencies:

- There is no clear statement of what conviction, sentence or action petitioner challenges and when it occurred;
- There is no information regarding the state appellate history of petitioner's case and no indication of whether or not he has exhausted available state remedies regarding his claim(s);

- 1 • There is no statement of what claims Petitioner seeks to raise.
- 2 • There is no statement of why a stay or proceedings is necessary
- 3 or warranted under the law.

4 On the other hand, if Petitioner simply seeks an extension of
5 time in which to file a petition, the request must be dismissed. The
6 timely filing of a federal habeas petition is not jurisdictional, but
7 rather is subject to equitable tolling if extraordinary circumstances
8 beyond a petitioner's control make it impossible to file a petition
9 on time. See, e.g., *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir.
10 1999). However, the Court concludes that a motion to extend time to
11 file a petition must be denied and the matter dismissed without
12 prejudice for the following reason.

13 Petitioner's request in effect seeks an advisory opinion as to
14 whether petitioner's federal habeas petition will be time-barred (a)
15 if the petition is filed at some unspecified date in the future which
16 may or may not be within the one-year limitation period, and (b) if
17 the State then raises the time bar issue as a defense. Thus, the
18 motion seeks relief which the Court could not grant without violating
19 the "case or controversy" requirement of Article III, Section 2 of
20 the United States Constitution. See *In re Brockett*, 2006 WL 1329675
21 (N.D. Cal. 2006); *In re Burgess*, 2001 WL 603609 (N.D. Cal.); *Wawak*
22 *v. Johnson*, 2001 WL 194974, adopted, 2001 WL 290526 (N.D. Tex.); *In*
23 *Re Watson*, 1997 WL 487431, *1 (N.D. Cal.); see also *United States v.*
24 *Leon*, 203 F.3d 162, 164 (2d Cir. 2000) (holding that a federal court
25 lacks jurisdiction to consider the timeliness of a § 2255 petition
26 until a petition actually is filed); *United States v. Clarke*, 1998
27 WL 91069, *1 (D. Conn.) (denying request for extension of limitations
28 period to file § 2255 motion); *Application of Wattanasiri*, 982 F.

1 Supp. 955, 958 (S.D.N.Y. 1997) (same).

2 Based on the above-noted deficiencies, the petition is DISMISSED
3 with leave to amend. Petitioner may file a "First Amended Petition"
4 not later than 30 days from the date of this order. To that end, the
5 Clerk is instructed to send to petitioner with this order a copy of
6 the latest version of form Civ 69 - Petition for Writ of Habeas
7 Corpus by a Person in State Custody, pen-changed to reflect "First
8 Amended" Petition. Petitioner is advised that no attachments may
9 accompany the First Amended Petition except for a SINGLE page
10 inserted behind page 6 of the form, if required. **Petitioner is**
11 **further advised that if she fails to file a First Amended Petition**
12 **in accordance with the requirements of this order, the action will**
13 **be subject to dismissal without further notice.**

14 Dated: June 23, 2008

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17 Marc L. Goldman
18 United States Magistrate Judge
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